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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 PETER ALLEN, on behalf of
4 themselves and others
5 similarly situated, *et al.*,

6 Plaintiffs,

7 v.

19 Civ. 8173 (LAP)

8 CARL KOENIGSMANN, M.D., *et al.*,

9 Defendants.

-----x

New York, N.Y.

May 31, 2023

10:30 a.m.

11 Before:

12 HON. LORETTA A. PRESKA,

13 District Judge

14 APPEARANCES

15 LAW OFFICE OF AMY JANE AGNEW
16 Attorneys for Class Plaintiffs
17 BY: AMY JANE AGNEW
18 JOSHUA LEE MORRISON

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20 Attorney for Defendant Moores
21 BY: ORIANA KILEY
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24 Attorney for Defendants Andola, Gusman, Lee,
25 Mantaro, Karandy, Acrish, Ashong, Braselmann
BY: RYAN E. MANLEY

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Dinello, Hammer, Salotti
BY: MICHAEL J. KEANE
IAN RAMAGE
PAMELA KNIGHT

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1 (Case called)

2 THE COURT: Good morning, counsel. Judge Preska here.

3 COUNSEL: Good morning.

4 THE COURT: Who is on for plaintiffs, please?

5 MS. AGNEW: Good morning, your Honor. A.J. Agnew here
6 with Josh Morrison, and we have three summer law clerks.

7 THE COURT: Wonderful. And who is on for Dr. Moores,
8 please?

9 MS. KILEY: Good morning, your Honor. Oriana Kiley
10 and Will Nolan.

11 THE COURT: Good morning.

12 Anybody else on?

13 MR. KEANE: Yes. Michael Keane, from the Office of
14 the Attorney General. Good morning.

15 THE COURT: Good morning, Mr. Keane.

16 MR. RAMAGE: And Ian Ramage and Pamela Knight, also
17 with the Attorney General's office. Good morning, your Honor.

18 THE COURT: Good morning.

19 MR. MANLEY: Ryan Manley, from Conway Donovan &
20 Manley, on behalf of the non-State represented defendants.
21 Good morning, your Honor.

22 THE COURT: Good morning, Mr. Manley.

23 Who else? Okeydoke.

24 I received Dr. Moores' letter dated May 30. Do
25 plaintiffs have a response?

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1 MS. AGNEW: We don't, your Honor. We actually spent a
2 lot of time on that proposed form of order. We think it is
3 quality. We think it does what it needs to do.

4 I don't know what more I can say. If they have a
5 problem with the temporal constraints, I didn't see them
6 actually offer alternative suggestions. So if they need six
7 months to comply, I think that's something we are happy to talk
8 about, but all I heard was, *We can't get it done*. I didn't
9 hear when we can get it done.

10 THE COURT: Okay. With respect to the items -- by the
11 way, Ms. Kiley, do you want to respond now? Do you have
12 anything else to say on that?

13 MS. KILEY: Yes. Just that, you know, I wasn't sure
14 how far we were going to go as far as letting both parties
15 offer proposals, which is the only reason I didn't offer
16 further suggestions or proposals in response to plaintiffs'
17 proposal. But I do -- I just have more to say on Dr. Moores'
18 behalf as far as the terms and the way they are phrased. It is
19 just very vague and there are a lot of terms that need to be
20 defined. I know that Dr. Moores is not going to be comfortable
21 executing the order the way it is drafted by plaintiffs, and I
22 hope that the Court, you know, would consider, at the very
23 least, the second draft that Dr. Moores put forward to the
24 Court.

25 THE COURT: Ms. Agnew.

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1 MS. AGNEW: Your Honor, look, our position is that
2 policy 1.24A was put forth by Dr. Moores and by DOCCS as a
3 solution to the ongoing constitutional violation. We think
4 that we evoked testimony during our evidentiary hearing that
5 the primary problem right now is compliance and enforcement. I
6 think this preliminary injunction just asks that they comply
7 with and enforce the policy. And, in fact, it really just
8 mimics what Dr. Moores has told the Court that she was going to
9 do.

10 I have to say, I was a little surprised to see in
11 Ms. Kiley's letter that Dr. Moores "intends on training the
12 staff," because Dr. Moores said to the Court in November of
13 2022 she was going to do that. It is now June of '23 and we
14 still don't have staff training. I'm at a loss as to why that
15 would be.

16 But I do think that our proposed form of order just
17 generally tracks what DOCCS has already said it's willing to do
18 and, in fact, intends on doing.

19 THE COURT: Anything else, Ms. Kiley?

20 MS. KILEY: Yes, your Honor.

21 Respectfully, the Court and plaintiffs asked for a
22 plan. We put together a specific plan in our second proposal,
23 and now plaintiffs' counterproposal now backtracks and gets
24 very vague again.

25 So just by way of example, paragraph 4 that says

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1 "identify those who suffer," well, when Dr. Moores reads that,
2 she says, *Well, okay, there's 32,000 incarcerated individuals.*
3 *Are we supposed to review all their records or do we interview*
4 *them and take a survey?*

5 And again, the time constraints are completely
6 unrealistic to do that. We are looking at at least an hour, if
7 not more, for each and every evaluation. It is unworkable as
8 it is written, and we are very concerned.

9 THE COURT: Except for I don't expect that you will
10 have to reevaluate all 38,000 inmates, right?

11 MS. KILEY: We certainly hope not, but the way that it
12 is written in plaintiffs' proposal, it is not clear.

13 THE COURT: Okay. How do you want to write it? I'm
14 looking at paragraph 4. What do you want it to say?

15 MS. KILEY: I would respectfully defer to the language
16 that was put into the second proposal, and when I say --

17 THE COURT: Tell me what the language is.

18 MS. KILEY: I would respectfully turn the Court's
19 attention to Docket 579-1.

20 THE COURT: Read it out loud, please. I have my copy
21 in front of me. We are doing this now together because you
22 people can't sit down and do it yourselves. So read to me the
23 language you propose.

24 Ms. KILEY: Okay. So paragraph (g) on page 5 of our
25 proposal states, "Dr. Moores, or her designees, shall review

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1 records maintained by DOCCS central pharmacy to determine
2 whether any incarcerated individual had medications
3 discontinued under the MWAP policy between 2017 and 2019."

4 THE COURT: That's not the text. That's not the text.

5 MS. KILEY: Excuse me?

6 THE COURT: That's not the text. That's part of the
7 text, but that's not the text. There are other -- I assume,
8 based on the testimony, there are other individuals suffering
9 from chronic pain who were not discontinued under the MWAP
10 policy.

11 MS. KILEY: Well, when read in its entirety, your
12 Honor, we do address that in our proposed order, 579-1.

13 THE COURT: Ms. Agnew, what do you say to that
14 language?

15 MS. AGNEW: Well, your Honor, the policy already
16 states that they are going to give chronic pain patients the
17 code 338. That's all we are asking them to do. That's what
18 they have said is already underway.

19 We are then asking that those patients, once coded,
20 get an assessment. That's what they have already said they are
21 going to do. That's what we want the order to say.

22 I don't think that this is complicated at all, but I
23 certainly cannot sign on to language that restricts the
24 universe of patients they are going to look at as to those who
25 lost medications between '17 and '19, because we already know

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1 of hundreds of people who come in after that date and whose
2 medications were summarily discontinued at intake. They are
3 not going to show up in those records. So if they go and they
4 do their normal 338 analysis, which they claim they are already
5 doing, it should sweep up everybody in every group.

6 THE COURT: Ms. Kiley.

7 MS. KILEY: Your Honor, the individuals that are
8 already coded 338 are on track to getting the care that they
9 need under 1.24A. Ms. Agnew --

10 THE COURT: That's not this paragraph. We had
11 evidence during the hearing of people whose medications were
12 discontinued when they transferred facilities and people whose
13 medications were discontinued after years on the outside upon
14 intake. I assume that when 1.24A was instituted, we were going
15 to look for those folks.

16 MS. KILEY: Well, the proposed -- our second proposal
17 has an entire section on transfers and what the protocols are
18 supposed to be on intake. As far as reviewing diagnostic tests
19 and meeting with the patient to figure out whether or not they
20 have --

21 THE COURT: Let me just ask you this. In your first
22 point in your letter, you say that the order is too intrusive,
23 and yet now you are asking me to make it even more detailed as
24 to what DOCCS has to do to identify the folks that are the
25 subject of paragraph 4. You can't have it both ways. We can

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1 write a protocol for intake, we can write a protocol for
2 transfer, but it seems to me that something more general like
3 paragraph 4—and I will pass the 60 days for a
4 moment—something more general allows Dr. Moores to take the
5 steps she deems necessary in order to identify these people.
6 Doesn't that seem to be less intrusive than our sitting here
7 and writing five different protocols for five different
8 situations and probably then not getting them all anyway?

9 MS. KILEY: Respectfully, I don't think that level of
10 detail necessarily is intrusive. Our position under the
11 intrusiveness has to do with turning a DOCCS policy into law of
12 the case.

13 THE COURT: I understand that. But on your
14 intrusiveness point, isn't it more intrusive to be more
15 granular?

16 MS. KILEY: Our position on intrusiveness would be --
17 with the Court's, again, creating a binding policy on DOCCS
18 indefinitely, that would be intrusive as to Dr. Moores --

19 THE COURT: To that point, and I had not actually
20 gotten to that point in ruling on it, but you can always ask
21 for something to be amended. That's not the point here.

22 Let me do this. It seems to me that it is better to
23 give Dr. Moores the flexibility she needs in the ways the
24 individuals who are the subject of paragraph 4 are identified,
25 and therefore I will keep this language. But I have to say, I

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1 was a little skeptical of the 60-day time limit also.

2 What else, Ms. Kiley? Let's hold the 60-day time
3 limit off to the side and continue through, please. I had
4 started, Ms. Kiley, with your letter. Do you want to continue
5 and talk about, for example, your point "second." It seems to
6 me that this could easily be remedied by talking about an
7 individualized assessment within X days of the entry of this
8 order or X days of the patient's most recent evaluation,
9 whichever is later.

10 Doesn't that take care of you?

11 MS. KILEY: I'm sorry. Just so I'm understanding,
12 the -- so you are saying --

13 THE COURT: I'm looking at number two of your letter,
14 the full paragraph says "second," and you say, "Plaintiffs'
15 proposed order would impose additional evaluations termed
16 'individual assessments' to take place within 30 days of the
17 entry of the order," and then you write "irrespective of when
18 each patient's last follow-up or assessment actually takes
19 place." I get that. If the assessment took place within the X
20 days—whatever X is going to be here—that's fine. We can
21 write it that way. Right?

22 MS. KILEY: Yes.

23 THE COURT: And again, it might not necessarily be 30
24 days. But doesn't that address your point?

25 MS. KILEY: Yes.

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1 THE COURT: Okay. So we will insert language to that
2 effect.

3 I actually wasn't sure what your objection on the
4 "narrowly tailored" was. The point is that the members of the
5 class have been shown to have had their pain medication
6 discontinued for nonmedical reasons. And they might be
7 different nonmedical reasons. It might be the transfer. It
8 might be upon intake. It could be a lot of things. But that
9 is the issue we are looking at and, in my view, that doesn't
10 make the proposed term not narrowly tailored, to use a double
11 negative.

12 Is there anything else you want to say about that?

13 MS. KILEY: No, your Honor.

14 THE COURT: Okay. That objection is rejected.

15 With respect to the time period, I take your point
16 that 30 days is probably a little light on some of these items,
17 but I also think this is related to your last point, which is
18 the period of the injunction. For example, I'm looking at the
19 case you cited in the Northern District. "Plaintiffs may seek
20 to renew the preliminary injunction for an additional 90 days
21 by making a request with the Court in writing seeking such an
22 extension or the parties may file with the Court a stipulation
23 agreeing to keep the preliminary injunction in place," etc.,
24 etc.

25 It seems to me we have to think about that and decide

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1 what we are going to do. If the answer is we are going to
2 insert language similar to that in the *Barrett* case that you
3 cite, then let's do it, and then we will see where we are. But
4 what we are not going to do is we are not going to have a new
5 preliminary injunction hearing every time if matters are not
6 resolved. On the other hand, as you know, we have a date for
7 the hearing on the permanent injunction, and we can certainly
8 keep that.

9 But with all of that behind us, I think you people
10 need to figure out what time periods you want in the
11 preliminary injunction order so that we know what we are doing
12 here. Again, I will go back to your objection that it is
13 probably a little ambitious to have every patient seen, having
14 an assessment within 30 days of the order and the like.

15 So what do you say, Ms. Kiley? What do you want to
16 do?

17 MS. KILEY: I would propose extending it until
18 certainly after the close of discovery and after the parties
19 have had an opportunity to file motions for summary judgment.

20 THE COURT: Okay. That was my last question. What in
21 the hell are you talking about? Summary judgment on what?
22 This is a preliminary injunction motion. What are you taking
23 discovery on? You just had discovery.

24 MS. AGNEW: Your Honor? Sorry.

25 THE COURT: Yes.

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1 MS. AGNEW: I am similarly bemused because, as far as
2 I know, the only discovery being taken right now is on
3 liability for the individual plaintiffs. That discovery
4 deadline is August 1. Everybody's been working very hard to
5 meet it. But there is no discovery going on right now on
6 injunctions nor has any been requested of us.

7 THE COURT: I have no idea what you are talking about,
8 Ms. Kiley. What do you mean by summary judgment motions? We
9 have had a hearing, a resolution, and we are now trying to
10 translate the resolution into an order. So I have no idea what
11 you are talking about.

12 MS. KILEY: The second amended complaint seeks relief
13 in the form of a mandatory injunction, as well. We would like
14 an opportunity to move to dispose of the case before that
15 decision is made on whether or not there is going to be a
16 mandatory injunction imposed.

17 With that --

18 THE COURT: What do you think this injunction is?

19 MS. KILEY: It's preliminary relief pending the
20 outcome on the merits.

21 THE COURT: Right. And the merits would be the final
22 injunction, the permanent injunction, the hearing date of which
23 has been set.

24 And by the way, what's your basis for summary
25 judgment?

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1 MS. KILEY: We would like to preserve our record to
2 make our arguments to dispose of the case on summary judgment.

3 THE COURT: What is your basis for summary judgment?

4 MS. KILEY: That the plaintiffs have not been able to
5 state a claim to succeed in actual success on the merits.

6 THE COURT: You have lost that.

7 MS. KILEY: Well, the standard for preliminary
8 injunction --

9 THE COURT: The preliminary injunction has been
10 ordered. The only question now is we are trying to write it
11 down, which you people don't seem to be able to do, and the
12 only then question is whether there will be a final injunction.
13 The hearing date for that has been set. What are you talking
14 about?

15 MS. KILEY: Respectfully, it's my understanding that a
16 permanent injunction gets entered after a trial on the merits.
17 So this is where I am also -- forgive me, but I'm confused.

18 THE COURT: That's what the final injunction motion --
19 that's the hearing on the final injunction.

20 MS. KILEY: But the standard for --

21 THE COURT: They mean the same thing.

22 MS. KILEY: But the standard for a permanent
23 injunction we know is different than preliminary. It is actual
24 success on the merits. The merits of the case are still being
25 litigated on the liability side. So I don't -- my

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1 understanding is that you actually have to proceed with a trial
2 on the merits as to my colleagues they (unintelligible)
3 represent a defendant --

4 THE COURT: I'm sorry. I missed the last part,
5 please. You said, "My understanding is you have to proceed
6 with a trial on the merits," and I missed what happened next.

7 MS. KILEY: For the liability claims, so the trial
8 would be for my colleagues so that there would be a judgment
9 entered and then, following that, would be whether -- the
10 decision on whether or not it requires a permanent injunction.

11 THE COURT: Why would you have to do it in that order?
12 Ms. Agnew.

13 MS. AGNEW: Yeah. Your Honor, forgive me. We don't
14 read the law the same way as defendants. I think it goes back
15 to a fundamental question which they have raised in their
16 questions on appeal. We think they are very incorrect on the
17 reading of the law there.

18 But I certainly think there is no grounds for summary
19 judgment. I think it's a waste of judicial resources. I think
20 it's a waste of all the parties' time. I think that if the
21 state representative defendants and the non-state
22 representative defendants wanted to file motions for summary
23 judgment on the individual damages claims of the plaintiffs,
24 that's another matter, but they are trying to scoop it all in
25 together. We are happy to meet that obligation in the

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1 permanent injunction hearing, but I don't think it is necessary
2 for us to gain permanent injunctions under Second Circuit law.
3 In fact, your Honor even cited to those cases in your opinion,
4 if everybody in the room is paying attention.

5 So that's our position. We have already sent out
6 subpoenas for August 7. We are ready to go. We need these
7 permanent injunctions for all of the reasons that are being be
8 regurgitated on the record here today.

9 THE COURT: Let me just ask Mr. Keane and Mr. Manley
10 if they have anything to add on this.

11 MR. MANLEY: This is Ryan Manley.

12 This actually brings up an interesting angle, and
13 maybe we can just get some clarification here. But, you know,
14 the determination by the Court as for a permanent injunction
15 will be actual success on the merits. And the success on the
16 merits we are talking about, if I'm reading the preliminary
17 injunction decision correct, is the individual claims against
18 the DOCCS treating physicians, being my clients. If there is
19 to be a determination of actual success on the merits, I
20 don't -- you know, I have questions regarding estoppel, I have
21 questions regarding law of the case, and I think that to have a
22 determination on the claims against my clients with regard to
23 the actual success on the merits prior to summary judgment and
24 basically without their right to a jury trial, I think
25 prejudices them.

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1 THE COURT: I'm not --

2 MR. MANLEY: And I --

3 THE COURT: I'm not understanding what I think is the
4 leap you are making. An injunction essentially is systemwide.
5 It really is not a finding, I don't think, of liability with
6 respect to any individual healthcare provider within the
7 system. I mean, the titular head, of course, Dr. Moores, in
8 her official capacity is involved, but I don't see how it
9 affects your client, Mr. Manley. I would think each of them is
10 affected in the individual liability suits that have been filed
11 so far. Am I reading that wrongly?

12 MR. MANLEY: No. And I would agree with you, Judge,
13 except -- for the individual lawsuits that have been filed.
14 Right now, with regards to this case, we are still all
15 operating under the same index number and the same pleading,
16 and the hinge of the meritorious claims here are all tied into
17 this Count Two, right? It's the Count Two against the --

18 THE COURT: The injunctive count, right?

19 MR. MANLEY: No, that's the liability count, Judge.

20 THE COURT: I guess -- yeah.

21 MR. MANLEY: In the preliminary injunction decision,
22 you know, you found there to be a likelihood of success on the
23 merits with regard to the treating physicians. And if I'm
24 reading the proposed order submitted by the plaintiffs, it also
25 states that specifically "the Court found that members of the

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1 plaintiff class were likely to prevail on the merits of their
2 claims that DOCCS medical providers are deliberately
3 indifferent to the serious medical needs of treatment." So it
4 would seem to me -- and that's why I am just kind of throwing
5 this out there right now, it would seem to me that an actual
6 determination of success on the merits, that your Honor would
7 have to find that certain DOCCS physicians were deliberately
8 indifferent to or are deliberately indifferent to specific
9 plaintiffs. That is a determination that is typically --
10 that's why permanent injunctions are typically last, like
11 Ms. Kiley was talking about. But it's but for this 90 day
12 thing for the PLRA that this cart has literally been put before
13 the horse. And that's why I would also support language to
14 this -- I don't have standing, because I don't have standing in
15 this injunction area, but I would support language in the PI
16 with regard to reapplying to the Court for preliminary relief
17 as opposed to all of us, you know, slamming this permanent
18 injunction thing in which, like I said, I think it prejudices
19 my client.

20 MS. AGNEW: Your Honor?

21 THE COURT: Yes.

22 MS. AGNEW: I guess I think we have to go back to some
23 basic constitutional law. It's long been held that a series of
24 violations -- which, by the way, any individual violation does
25 not have to rise to the level of a constitutional violation.

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1 When you read that series together, you can have a finding of
2 constitutionally violative behavior that has to be corrected
3 through an injunction. We did a lot of work before we ever
4 filed this case and we did it because we needed to. I
5 understand everyone's apprehensions about the law, but I think
6 we have got to go back to the case law.

7 THE COURT: The part I guess I am confused about is we
8 have a finding on the need for the injunction because of the
9 essentially systemwide breakdown. Although there were factual
10 findings within the preliminary injunction opinion, the
11 specific occasion when specific healthcare providers did
12 violate individuals' constitutional rights, those were few and
13 far between. There weren't a lot of them. But the finding of
14 the need for the preliminary injunction reflected the finding
15 of systemwide breakdown. That's why we need the injunction.

16 With respect to Mr. Manley's situation, I guess we
17 will have to rethink what, if anything, is open to the
18 healthcare providers. And I don't know if they are
19 Mr. Manley's clients or Mr. Keane's clients, but we have to
20 rethink what, if anything, is open to those individual
21 healthcare providers on the liability damages phase later on.
22 But I, again, am not understanding why the injunction phase is
23 not separate and should not move forward.

24 MR. KEANE: Your Honor, Michael Keane for the state
25 defendants.

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1 THE COURT: Yes, sir.

2 MR. KEANE: We share some of the same concerns that
3 Mr. Manley articulated, also the concerns that Ms. Kiley had.
4 It is awkward that the injunction finding, if it relies on a
5 breakdown of the system, to the extent that any defendant in
6 the damages cases is involved in what the Court would be
7 finding in August as a breakdown of that system, that seems to
8 put the cart before the horse in that if there is a finding
9 that there is a breakdown that could have involved any of the
10 individual defendants, then that is a problem, as Mr. Manley
11 said, as to its impact on the liability cases. Is it an
12 estoppel? And further, is it a situation in which the
13 individual defendants have been -- since they have no standing
14 in the injunction hearing, are they able to defend themselves
15 against allegations?

16 THE COURT: I hear you.

17 MR. KEANE: That would be the concern, your Honor.

18 THE COURT: I hear your concerns. And with respect to
19 the injunction, it seems to me one would expect evidence in
20 support of the request for the injunction to include, as it did
21 here, instances of constitutional violations. I'm not saying
22 as I sit here now that those findings are automatically
23 liability findings with respect to the individual healthcare
24 providers. Taking Mr. Manley's point, and I don't know the
25 answer to this, maybe they are entitled to a jury trial? I

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1 don't know. But that's not today's problem. We will worry
2 about that when we get to the damages question with respect to
3 the individual plaintiffs.

4 Today's problem is writing a preliminary injunction
5 for Pete's sake. I don't understand why we can't get this
6 done, and I certainly don't understand why our writing down on
7 a piece of paper what policy 1.24A requires and saying, okay,
8 you've got to do that now, I don't understand why that's some
9 kind of overreach.

10 Who else wants to be heard? I'm sorry, Mr. Keane.
11 Had I interrupted you probably?

12 MR. KEANE: No, your Honor. And I apologize, I'm at a
13 rest stop on the LIE on my way to our Long Island office, and
14 there may be noise in the background, but I completed my
15 thought. Unless your Honor has something else, I can stop
16 talking.

17 THE COURT: Okay. So sorry that you are on the LIE.
18 Shouldn't happen to a dog.

19 Who else wants to be heard, please?

20 MR. MANLEY: Your Honor, just to kind of sum up my
21 position here.

22 THE COURT: Mr. Manley, is that you?

23 MR. MANLEY: Yes, it is. I apologize. I didn't
24 identify myself. Yes, it's Ryan Manley.

25 You know, Judge, with these questions looming with

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1 regard to the status of what the final determination on a
2 permanent injunction would mean for my client's rights, I am
3 fully in support of kicking out the preliminary injunction
4 hearing and instead, if the government's willing to stipulate
5 to its -- and I don't know this, but if the government is
6 willing to stipulate beyond the 90 days for the preliminary
7 injunction or -- I don't know this either, or stipulate to the
8 terms of the *Barrett* case, I think that putting off the
9 permanent injunction is warranted to avoid the potential of
10 prejudice to my clients.

11 THE COURT: Ms. Kiley, are you in a position to agree
12 to that? What I understand --

13 MS. AGNEW: Your Honor?

14 THE COURT: Ms. Agnew. So sorry.

15 MS. AGNEW: I'm sorry. I'm being a pain this morning.

16 You know, that's called a consent order. We are happy
17 to do it. we have been happy to do it from day one. I have
18 clients right now who are being transferred and are losing
19 their medications literally as we speak. It is now seven
20 months since Dr. Moores swore under oath to this Court that she
21 was going to train her own staff on a policy she wrote. It
22 still hasn't happened. I would love to kick this out. I love
23 August at the beach. But guess what? I've got clients who are
24 suffering, and I have no motion on the other side, and that's
25 our concern, and I have to do the best thing for my clients

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1 here. If they don't want to have a hearing in August, it's
2 called a consent order.

3 And everybody wants to go back to this Judge
4 D'Agostino case. But if you actually look at Pacer and the
5 docket, the reason the judge inserted that language is because
6 the parties were close to a settlement. Within five months I
7 think they signed the settlement documents and everybody on
8 this phone call knows that they were deep in negotiations at
9 that point and the judge was trying to insert something to get
10 this settlement done.

11 THE COURT: Let me ask this question. I promise you
12 within a few days we are going to have a preliminary
13 injunction, and it's going to be along the lines in a
14 submission, which is along the lines of what defendants said
15 they were going to do.

16 Let me ask you this, Ms. Agnew. Let's assume we
17 adjust some of the time periods in here. What I am trying to
18 say is aren't your clients protected by the entry of the
19 preliminary injunction with respect to these, either intake,
20 discontinuations of medication, or discontinuations upon
21 transfer? Those are clear terms in the injunction which can be
22 remedied immediately. I take your point, Ms. Agnew, that it
23 will take a while for the assessments and the identifications
24 through the system, but it seems to me that once the
25 preliminary injunction is entered, your clients are protected

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1 from those immediate discontinuations.

2 What do you say to that?

3 MS. AGNEW: With all due respect, your Honor, only if
4 DOCCS medical staff are trained. And I say this because 1.24A
5 has actually been the policy of DOCCS since February of 2021,
6 and that's why we spent so much time putting evidence before
7 the Court that, as wonderful as this piece of paper is, it
8 hasn't made an impact because people weren't trained.

9 THE COURT: Right.

10 MS. AGNEW: So I hear you and I think if we bumped up
11 the training and that became a priority and I knew that these
12 people not only are getting a copy of this order but they are
13 being trained within 30, 45, 60 days, I do think that has a
14 direct and immediate impact on those transferees, and I agree
15 with you. But if they are not trained for another six months,
16 it doesn't do anything, in my mind and experience.

17 THE COURT: Okay. I would think, Ms. Kiley, that the
18 training materials are ready. We know we have to do this. We
19 have known it since the day the policy was entered. Why can't
20 that be done quickly?

21 MS. KILEY: Your, Honor we can certainly work to get
22 it done within an appropriate time period. I still think that
23 30 days is very aggressive, so I would ask for something more
24 than that to complete training.

25 THE COURT: I'm going to change it to 45.

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1 How many facilities do we have, please? Remind me.

2 MS. AGNEW: It should be 44.

3 THE COURT: Okay. I think we can do this.

4 On paragraph 2, on page 7 of the order, I'm changing
5 it to 45.

6 Somebody is squeaking.

7 MS. AGNEW: I'm going to mute again. I apologize,
8 your Honor. I'm walking into the federal courthouse in Albany
9 for an appearance before Judge Sharpe. So I'm going to go mute
10 unless you need me and scream my name.

11 THE COURT: Thank you.

12 Ms. Kiley, what's your position on the *Barrett*
13 language?

14 MS. KILEY: I would respectfully ask the Court to
15 include language that we included in our --

16 THE COURT: I don't know what language you are talking
17 about because I have not memorized all the orders.

18 What is your position on the *Barrett* language?

19 MS. KILEY: That the parties may renew the terms of
20 the injunction for an additional 90 days after its entry.

21 THE COURT: Plaintiffs may seek to renew by making a
22 request in writing or the parties may stipulate. You can't
23 argue with that, can you?

24 MS. KILEY: No.

25 THE COURT: All right. So that's going in.

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1 What else do you want to talk about now?

2 MS. AGNEW: Your Honor, I would just say I want to
3 address a point that Ms. Kiley raised in her letter which I
4 think is a valid one but I also think we tried to cover in
5 advance. I think she made the suggestion that Dr. Moores
6 should be free to change 1.24A if she thinks it is medically
7 necessary or in the best thoughts at the agency, etc., etc. We
8 did put in the provision she can certainly -- she could change
9 any policy any day. We just want to have notice. We want to
10 know what's happening. Because usually what I do is I get a
11 call from some other lawyer whose gotten a copy of a policy,
12 and that's how I find out. And I do think that if that
13 happens, and I'm sure she will have very valid reasons or she
14 wouldn't do it, we just are on notice and we kind of figure out
15 the implications of this for our clients so that we can seek
16 relief if we need it.

17 THE COURT: I don't think that I saw that in here.
18 Did I miss it?

19 Ms. KILEY: Respectfully, your Honor, I didn't see it
20 and I don't think that's appropriate that the chief medical
21 officer should run by plaintiffs' counsel --

22 MS. AGNEW: Not run by.

23 THE COURT: Not run by. She said notice.

24 Any objection?

25 MS. KILEY: I would respectfully -- yes, I would ask

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1 that the Court not include language to that effect.

2 THE COURT: Why?

3 MS. KILEY: Because Dr. Moores is specifically
4 qualified to implement policy administration and amendment as
5 she sees fit based on her very extensive experience in clinical
6 administration and she -- that is essentially why she was hired
7 to do what she does. She is permitted to do that, and she does
8 not need to go outside of the agency in order to conduct her
9 job.

10 THE COURT: That's not what is being requested. What
11 is being requested is mere notice that she is going to make a
12 change to 1.24A.

13 Given the situation, I will include that. Ms. Agnew,
14 send me language. Run it by Ms. Kiley, please.

15 MS. AGNEW: Okay. It's in the proposed order now,
16 your Honor, that we put forth, but if Ms. Kiley wants to shoot
17 me an e-mail with an alternative, I'm happy to looking at it.

18 THE COURT: Forgive me. I didn't memorize it.

19 MS. AGNEW: That's okay.

20 THE COURT: But if you people want a change, you will
21 let me know in two days.

22 What else do you want to talk about with respect to
23 this order?

24 MS. KILEY: Your Honor, the very last point that
25 "failure to comply with this order shall not be excused by

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1 allegations of inadequate staffing," I would respectfully ask
2 the Court to exclude that language. Staffing is without a
3 doubt an issue, and it is going to be an issue if we are going
4 to now focus on evaluations and review of medical records and
5 coding and a lot of new administrative responsibilities that
6 this order is going to ask of DOCCS staff. It is a very big
7 undertaking. I know plaintiffs like to say that this is
8 simple. It is not going to be simple, and I think that
9 essentially putting, again, the cart before the horse and not
10 anticipating what some of our, you know, issues might be along
11 the way is unfair. I think this Court has to consider that
12 staffing will be an issue, and I don't think that language to
13 this effect should be included.

14 THE COURT: Ms. Agnew.

15 MS. AGNEW: First of all, your Honor, I copied that
16 language precisely from some other similar injunctions across
17 the country. Second of all, we know they are going to do it,
18 and I appreciate that. Obviously, as the Court knows, I'm well
19 aware of the staffing issues within DOCCS. What I say is,
20 don't strike the provision, but tell us when you can get it
21 done with the resources you are going to be able to muster.
22 And when we look at the contempt standard, the question is
23 really did you muster all of the resources that you have. If
24 they didn't have the resources, I can't hold them -- or the
25 Court can't hold them in contempt. So this is a nonissue. But

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1 I don't want to start out of the gate with this injunction's
2 nice but we can't get it done when in fact the entire
3 injunction comes from their own policy, and I would assume they
4 don't just have policies that they can't implement.

5 THE COURT: All right. Denied.

6 Page 8, paragraphs six and seven, those are the 30-day
7 paragraphs.

8 Ms. Kiley, what do you say to those?

9 MS. KILEY: It is not going to be possible to get
10 evaluations done in 30 days. I would ask for extended -- I
11 would ask that there not be a deadline imposed for these
12 evaluations to happen.

13 THE COURT: Ms. Agnew.

14 MS. AGNEW: Well, your Honor, in November of 2022 --
15 '20, they actually did 83 evaluations within what I am going to
16 say was about a 45-day period. I think when there is a will
17 there is a way. I'm not suggesting 30 days is appropriate, but
18 they need to come back and say to us, *Hey, we can get this done*
19 *within six months, we can get it done within nine months.*
20 Like, I need to hear some rational numbers, not just *we don't*
21 *like yours.*

22 THE COURT: Ms. Kiley.

23 MS. KILEY: Respectfully, your Honor, now we are
24 talking about six months and nine months, which is a little bit
25 more reasonable than -- I would ask that that is the time

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1 period over which the Court has jurisdiction over the order.

2 THE COURT: What time period is it that you want?

3 MS. KILEY: Nine months.

4 THE COURT: You are not getting nine months.

5 MS. KILEY: Six months?

6 THE COURT: Ms. Agnew.

7 MS. AGNEW: I think six months with some kind of
8 rolling disclosures as to where they are in the process is
9 completely fair and appropriate, your Honor. I'm not asking
10 them to reevaluate hundreds, if not thousands, of prisoners in
11 30 days. But they know how long this is going to take. They
12 need to let us know.

13 THE COURT: All right. In six and seven you will
14 change it to I think it's 180 days, and would you propose some
15 language with respect to rolling reporting. I will look for
16 that in two days, please.

17 What else, friends?

18 MS. KILEY: Well, what exactly is rolling? To what --
19 to what extent is rolling reporting? What does that mean?
20 Like I know what it means.

21 THE COURT: I don't know, that means you will let them
22 know how many you are doing, when you are doing them, on a
23 contemporaneous basis, so that if we are falling behind and we
24 are doing one a week, they can come back and say what's going
25 on here? So you people work on the language.

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1 What else?

2 MS. AGNEW: Plaintiffs are good, your Honor.

3 THE COURT: Ms. Kiley.

4 Mr. Manley? Mr. Keane? Anything you want to add on
5 the order?

6 MR. KEANE: Nothing from state representative
7 defendants, just to reiterate our prior concerns, but that has
8 nothing to do with what is being discussed now. Thank you.

9 THE COURT: Yes, sir.

10 Mr. Manley?

11 MR. MANLEY: No, your Honor. I will just state that
12 now that the bare language has been agreed to and is in there
13 that I still fully support pushing out the permanent injunction
14 hearing date.

15 THE COURT: Let's do this. Let's keep the date we
16 have for now and, then we will see where we are later.

17 Mr. Keane, Mr. Manley, obviously we are going to have
18 issues going forward with how your individual folks are to be
19 treated, the folks who were the subject of findings in the long
20 memorandum. Do whatever you want to do about getting that
21 straightened out. You know, if we have to litigate it,
22 obviously we will do it. So do your work in case so that we
23 don't have to extend this unnecessarily.

24 I will just recall to you our conversation when we
25 were together that after we gathered a reasonable number of

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1 these individual cases, we might sit down and discuss an
2 efficient way of disposing of them. So I am not asking you to
3 do a lot of work and billing right now, but I am asking to you
4 consider it and take your best guess as to where we are going
5 to be, so that if the time comes when we have to litigate the
6 import of the findings on the individual healthcare providers,
7 we don't need six months to brief it.

8 Do you understand, gents?

9 MR. KEANE: Yes, your Honor.

10 MR. MANLEY: Yes, your Honor.

11 MR. KEANE: We will take that to heart. Thank you.

12 THE COURT: Thank you so much.

13 With respect to Ms. Agnew's student law clerk,
14 whatever, summer clerks, any objection to the proposal she has
15 submitted in her letter of May 29, Ms. Kiley?

16 MS. KILEY: No, your Honor.

17 THE COURT: Mr. Keane?

18 MR. KEANE: No, your Honor.

19 THE COURT: Okay. So that will be taken care of.

20 With respect to the billing records, I am not sure,
21 Ms. Kiley, what the objection is. The rate is not privileged
22 information. Counsel has allowed as how there will be
23 privileged information that can be and should be redacted. I'm
24 not sure what the argument is against production.

25 MR. NOLAN: Your Honor, this is William Nolan in

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1 response to that request.

2 We oppose any production of our own billing records.
3 She is not seeking production of our rates necessarily, which
4 is one thing. She is seeking the actual time entries, and we
5 think it is inappropriate. We don't think that there is any
6 relevance to the issues before the Court, particularly because
7 we came into this case far later than anybody else and had been
8 working at a different pace and on different tasks than
9 plaintiff has. And I think that the concerns really go -- are
10 laid out by the Western District in a case called *Costa v.*
11 *Sears Home Improvement*.

12 THE COURT: I have it memorized.

13 MR. NOLAN: You have seen that case, your Honor?

14 THE COURT: I have not. I am being facetious. Do you
15 want to give me a cite?

16 MR. NOLAN: Yeah, it is 178 F.Supp.3d 108.

17 Basically, our concerns are the same there. Right?
18 The importance of our billing records to a potential request in
19 the future if Ms. Agnew is successful on the merits and gets a
20 permanent injunction is minimal in this situation, frankly,
21 because we are doing different things. Her job is very
22 different than our job.

23 And what's more important, really, is the Court's
24 experience in this area with the rates in these types of cases,
25 rather than us producing our billing records, which I

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1 understand actually have been FOIL'd by Ms. Agnew anyway. So
2 to the extent there is anything in there that she is seeking,
3 they would be redacted anyway. So I don't see a real -- we
4 would oppose any motion. If she wants to make that motion, we
5 are happy to put in our opposition on that, to brief it. We do
6 think it's premature and, as Ms. Agnew pointed out in her
7 letter, you know, we can do this at a later time if and when
8 potentially necessary.

9 THE COURT: Did I understand that your billing records
10 have been successfully FOIL'd by Ms. Agnew? Am I wrong on
11 that?

12 MR. NOLAN: That was my understanding from our
13 conversation was that they were either in the process of being
14 produced or they already had them.

15 THE COURT: Ms. Agnew.

16 MS. AGNEW: Your Honor, if I may, certainly we FOIL
17 everything. But as I laid out in my letter, we have not
18 received theirs. And when we do receive them, the entire
19 description blocks are redacted. That's not a battle I'm going
20 to have with Michael Ranieri over at DOCCS. As I said, they
21 can all redact privileged content. I do the same. I think
22 that's completely appropriate. But I also offered to them that
23 if they don't want to produce them, they can stipulate that
24 they are not going to fight our lodestar rates or the amount of
25 time we have spent on any given issue. I did provide the Court

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1 with some case law, so there is authority for what I am asking
2 for, and it is within our rights to ask for it. It is up to
3 the Court.

4 THE COURT: Is there any objection to producing the
5 rates, Mr. Manley?

6 MR. NOLAN: It's Mr. Nolan.

7 We don't have an objection to producing the rates.
8 And frankly, your Honor, we don't take any issue with
9 plaintiffs' rates. They are laid out in the Rule 26
10 disclosure—Ms. Agnew at 425 an hour and Mr. Morrison at 375 an
11 hour—and they seem to be in line with precedent in the
12 Southern District as to rates in these types of cases. So we
13 have no objection to those. I really think it is a battle that
14 doesn't need to be fought.

15 THE COURT: Ms. Agnew.

16 MS. AGNEW: Then they should have disclosed the
17 documents, your Honor. But thank you for hearing me.

18 THE COURT: All right. Let me just say this. Once we
19 see the fee application, if there are objections to how long
20 counsel and support staff spent on such things, it might well
21 be that the billing records are relevant. So be prepared. If
22 that's what it turns out to be, they are going to be ordered to
23 be produced. So be ready so that we are not sitting around for
24 months waiting on it.

25 I hesitate to ask, but when is the fee application

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1 coming in?

2 MS. AGNEW: Well, your Honor, we are thinking about
3 that strategically. I don't want to write two fee
4 applications. You know, it is a ton of work. If we are going
5 to move forward with the permanent injunction hearing in
6 August, I would then ask the Court to allow us to submit the
7 fee application after that order is issued. But if it looks
8 like they are going to keep kicking this out, we are going to
9 go ahead and put in our fee application for the preliminary.

10 I just don't want to do it twice. I'm sure you can
11 appreciate that.

12 THE COURT: I'm sorry. I don't want to do it twice
13 either.

14 You people be in touch with each other as we go
15 forward, and I will ask you for a monthly update on what you
16 foresee in terms of the preliminary injunction hearing. So a
17 month from today I need a letter.

18 In the meantime, I will look for the modifications
19 that we talked about today in the next two days or so, so that
20 the order can be entered.

21 Is there anything else we have to talk about?

22 MS. AGNEW: Not from plaintiffs, your Honor.

23 MS. KILEY: Not from Dr. Moores.

24 MR. KEANE: Not from state defendants.

25 MR. MANLEY: Not from non-state defendants.

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1 THE COURT: Thank you.

2 Folks, please be in touch with each other so that we
3 don't need to continue beating our heads against the wall.

4 For those of you who are out of your offices, thank
5 you for taking the time to be on the phone.

6 Good morning and thank you.

7 COUNSEL: Thank you.

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